UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION of MASSACHUSETTS, Plaintiff, v. KATHLEEN SEBELIUS et al., Defendants.	Case No. 1:09-cv-10038-RGS

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS TO INTERVENE AS A DEFENDANT

Pursuant to Fed. R. Civ. P. 24, the United States Conference of Catholic Bishops, Inc., ("USCCB") seeks to intervene as a defendant in the above-captioned matter before the court. USCCB respectfully requests permission to intervene to protect its substantial interest in defending, against Plaintiff's Establishment Clause challenge, the validity and enforceability of contract between Defendants and USCCB.

The current parties to this litigation, through counsel, have not consented to the USCCB's intervention at this time, both indicating that they intend to review the USCCB's arguments before deciding whether to do so or not.

As set forth in detail below, USCCB meets all of the criteria for a party to intervene as of right under Fed. R. Civ. P. 24(a), as well as the criteria for permissive intervention under Fed. R. Civ. P. 24(b).

ARGUMENT

Plaintiff seeks to challenge, as an unconstitutional establishment of religion by the federal government, a 2006 contract between USCCB and the defendant, the U.S. Department of Health and Human Services ("HHS"). This contract was subsequently renewed for a series of one year periods, and is now in its fifth year..

Under the contract, USCCB receives funds from HHS which USCCB provides to various non-governmental organizations throughout the United States. These organizations act as subcontractors, and use these funds to directly provide services to victims of human trafficking. This funding is authorized by the Trafficking Victims Protection Act ("TVPA"), 22 U.S.C. §§7105 *et seq.* USCCB, through these sub-contractors, has provided millions of dollars' worth of support and services to victims of human trafficking, and has itself overseen and managed the provision of these services.

Plaintiff's establishment clause argument rests on HHS' acceptance of USCCB's Proposal submitted in response to HHS's request for proposal (the "RFP"), a response that provided that USCCB would administer the program in a manner that does not provide funding for abortion services or artificial contraceptive materials, and on USCCB's administration of the program in accordance with that conscience provision. Plaintiff seeks an injunction "to ensure that the TVPA grant is implemented without the imposition of religiously based restrictions." Plaintiff thus appears to seek an order from this Court that would direct USCCB to allocate funds for the provision of abortion services and contraceptive materials in violation of USCCB's moral convictions and sincerely held religious beliefs, or that at a minimum would prevent the USCCB from continuing to perform on its contract with HHS within the bounds of USCCB's religiously-based standards. USCCB has a direct, substantial interest in maintaining the contract as written.

USCCB is entitled to intervene as of right pursuant to Fed. R. Civ. P. 24(a), which provides that the court must grant intervention: (1) where the party seeking to intervene claims an interest in the transaction that is the subject of the action; (2) disposition of the case without intervention by the party would, as a practical matter, impair or impede the party's ability to protect that interest; (3) the party's interest is inadequately represented by the existing parties; and (4) the motion for intervention is timely made. *See Geiger v. Foley Hoag LLP Ret. Plan*, 521 F.3d 60, 64 (1st Cir. 2008); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989).

I. *USCCB Has a Direct Interest in the Transaction, and Its Ability to Protect Its Interests Would Be Impaired Absent Intervention*

USCCB, as a party to the contract at issue in the case, has a compelling, legally enforceable interest in preserving the contract at the heart of this case with the conscience provision intact. USCCB's interest in defending the validity of the HHS contract with the conscience provision intact is directly implicated by the plaintiff's claim. *See Travelers Indem. Co.*, 884 F.2d at 638 (stating that while "[t]here is no precise and authoritative definition of the interest required," any interest claimed must "be direct, not contingent"). Plaintiff seeks an injunction that would require USCCB to provide material assistance to activities that violate its deeply held moral and religious beliefs in order to maintain its contract with HHS, or that effectively would require it to cease performance of its HHS contract.

II. *USCCB's Interests Are Not Adequately Represented by HHS.*

USCCB's interests are not adequately protected by the governmental defendants because USCCB's interests clearly differ from those of HHS. While USCCB and HHS clearly share the commitment, reflected in TVPA, to provide services for victims of human trafficking in a responsible and efficient fashion, it is unclear to what extent HHS shares USCCB's obligation to avoid complicity in the provision of abortion and contraception services.

USCCB also has a financial interest in the contract, which HHS clearly lacks, in that USCCB has employed staff whose compensation is funded, in whole or in part, by the contract with HHS. The government defendants cannot be assumed to adequately represent these interests. HHS, and the United States proper, are at no identifiable financial risk if the contract with USCCB is enjoined. Further, the USCCB's underlying ability to continue to provide services to trafficking victims, at all, would be severely if not fatally undercut if government support could no longer be forthcoming, whereas the government would presumably be able to continue to conduct anti-trafficking programs, through other contractors, even if the ACLU were to prevail in this matter.

Further, the interests of the USCCB will not be adequately represented by the United States in that the USCCB has, and wishes to intervene to defend, a particular view of First Amendment law that is directly implicated in this matter. The Department of Health and Human Services, as a governmental actor, does not necessarily agree with the USCCB's views in this regard. Specifically, the USCCB takes the position that the government is free to grant moral accommodations, which the USCCB proposed for religious reasons, just as it would if a government contractor proposed such an accommodation for secular reasons. The Establishment Clause should not be construed so as to create a potential conflict with the Free Exercise Clause, but it is unclear to what extent HHS may be expected to urge this legal position here.

Under the modest standards of inadequacy applicable to Rule 24 motions, USCCB has sufficiently alleged that HHS does not adequately protect USCCB's interests in this litigation. *See Utahns for Better Transp. v. U.S. Dept. of Trans.*, 295 F.3d 111, 116 (10th Cir. 2002) (stating that relying on governmental entities to represent the private interest of petitioners in intervention is "on its face impossible" and "creates the kind of conflict that satisfies the minimal burden of showing inadequacy of representation.") (quoting *National Farm Lines v. Interstate Commerce Commission*, 564 F.2d 381, 384 (10th Cir. 1977)).

III. *USCCB's Motion to Intervene is Timely*

USCCB's Motion to Intervene is timely, as this litigation is not in an advanced stage, and none of the existing parties would be prejudiced by USCCB's intervention. *See Geiger*, 521 F.3d at 64-65 (discussing factors relevant to the timeliness inquiry). Although this case was filed last year, it is still in the beginning stages, as the Defendants' Motion to Dismiss based on the ACLU's lack of standing was denied only recently, and Defendants' Answer was filed only a few weeks ago.[1] USCCB does not seek extension of any deadlines imposed by the Court's April 8, 2010 scheduling order.

IV. *In the alternative, USCCB should be permitted to intervene under Fed. R. Civ. P. 24(b).*

Alternatively, USCCB should be allowed to permissibly intervene pursuant to Fed. R. Civ. P. 24(b), which provides for intervention when a party "has a claim or defense that shares with the main action a common question of law or fact." USCCB's defenses related to its interests in the contract, as set forth in the attached answer that USCCB proposes to submit, are manifestly addressed to the same questions of law and fact raised Plaintiff's complaint and Defendants' answer.

CONCLUSION

For the reasons set forth above, USCCB meets all the requirements for intervention as of right pursuant to Fed. R. Civ. P. 24(a), and satisfies the criteria for permissive intervention

1 USCCB did not seek earlier intervention because of HHS's challenge to the Plaintiff's standing. Until those issues had been resolved, the need to intervene was uncertain.

pursuant to Fed. R. Civ. P. 24(b). USCCB therefore respectfully requests that its Motion to Intervene be granted.

Dated: June 2, 2010

Respectfully submitted,

/s/ Henry C. Dinger

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